Appendix

HARTER ACT.

Title 46. U. S. Code, Secs. 190, 191, and 192, Act of February 13, 1893, chapter 105, sections 1, 2 and 3, 27 Stat. 445.

Section 1.

§190. Stipulations relieving from liability for negligence. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Section 2.

§191. Stipulations relieving from exercise of due diligence in equipping vessels. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence* properly equip,

*The word "to" should probably be inserted though it was not in the original act as published in the Statutes at Large.

man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Section 3.

§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

QUOTATIONS FROM ADDITIONAL CASES REFERRED TO ON PAGE 22 OF THE FOREGOING BRIEF WHICH ARE IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE.

In *The Benjamin Noble,* 232 Fed. 382, 389 (E. D. Mich.), affirmed in 244 Fed. 95 (6 C.C.A.), the carrier relied on bill of lading exceptions against dangers of navigation, fire and collision. The Court said:

> "The claimants having shown that they made this contract directly with the owners of the vessel, to carry these rails, and that they were actually delivered in good order to the carrier, and that they received a bill of lading and receipt therefor, and then having proven that the cargo never reached its destination and was never delivered to the consignee, the claimant could then have rested its case, and the burden would have shifted to the petitioner in this case to prove the competency of its crew, the seaworthiness of its vessel, and that the loss occurred within one of the exceptions, such as perils of the sea, for which it is relieved of liability under the bill of lading and the so-called Harter Act."

In *The Kensington,* 88 Fed. 331, affirmed 94 Fed. 885, 2 C.C.A., affirmed on merits, but modified to allow recovery of actual damage instead of limited value, 183 U.S. 263, 46 L. Ed. 190, the Court said, pages 333-334:

> "One of the exemptions specified in this ticket or contract is losses 'by perils of the sea', and upon the evidence, if preliminary proof of good stowage had been given, I think a prima facie case of loss by sea perils would have been made out, which it was incumbent on the libelants to rebut by proof of negligence in the ship. The evidence leaves no doubt that the passage was one of very extraordinary severity, such as might account naturally for what happened, viz.

> the baggage getting adrift and breaking the steam pipe, even though the baggage was well stowed; but it might also have happened from poor stowage, of which some evidence was sought to be given, though I do not regard it as of much weight. There is no direct evidence of the mode of stowage, but only that the baggage was stowed by the regular stevedore of the line * * *."
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> "To assume proper stowage upon mere inference and to throw upon a shipper or passenger the burden of proving the contrary, without any proof by the ship, seems unreasonable and inequitable, considering that proof on this subject is peculiarly within the power of the ship to produce, and comparatively easy for her, but difficult if not impossible for the passenger or the shipper. Proper stowage, moreover, is essential to seaworthiness as respects cargo or baggage; and hence this essential preliminary condition of seaworthiness should have been established by the ship by proof of proper stowage, just as in The Edwin I. Morrison, 153 U.S. 210, 14 Sup. Ct. 829, it was held necessary to be established by proof of proper inspection."

In *The Agwimoon*, 24 Fed. (2d) 864, 867 (D. C. Md.), affirmed in 31 Fed. (2d) 1006 (4 C. C. A.), the carrier relied on a bill of lading exception against leakage and the Court held:

> "It was there held that the vessel, having failed to prove use of due diligence, could not rely on an exemption clause, in view of a provision incorporating the Harter Act in the charter."
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> "Thus, taking the charter as a whole, the proper meaning to be derived from it is that the shipowner shall be responsible for leakage, unless he has exer-

cised due diligence to make the vessel seaworthy at the inception of the voyage."

In *The Poznan,* 276 Fed. 418, 431 (S. D. N. Y.), Judge Learned Hand said, in language which speaks for itself:

> "The bill of lading contains exceptions against loss by thieves and by breakage. These exceptions are not in the words of the Harter Act, but no point is made that they are void for that reason, if construed with an implied limitation that due diligence was in fact used to stow, handle, load, and deliver. I shall therefore assume that they are valid, but such limitations are implied. The burden is on the ship to prove that the losses fall within the exceptions so construed."

In *The Cornelia,* 15 F. (2d) 245, 247 (S.D.N.Y.), the carrier relied on bill of lading exceptions against damage caused by sea water, wetting, drainage, leakage or wastage. The Court said:

> "From this absolute warranty the vessel and her owners may be relieved by special contract, provided due diligence has been exercised to make the vessel seaworthy. The Prussia, 93 F. 837, 35 C.C.A. 625. The exemptions found in the contract of carriage and in the bills of lading are sufficient for this purpose, provided due diligence has been exercisd to make the vessel seaworthy, but the claimant must sustain the burden of proving the exercise of due diligence."